

SOUTH DELTA WATER AGENCY

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September 18, 2007

Delta Blue Ribbon Task Force Members
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Re: A Vision for Durable Management of a Sustainable Delta
September 11, 2007, Draft

Dear Blue Ribbon Task Force Members:

On behalf of the South Delta Water Agency, I would like to submit the following comments.

The September 11, 2007 draft entitled *A Vision for a Durable Management of a Sustainable Delta* includes a number of important issue and conclusions which are necessary for addressing both the Delta and the ever increasing water needs of the state. We especially appreciate inclusion of the many valuable ideas first raised in Tom Zuckerman's *Water Plan for the 21st Century*. For example, the need for "the state as a whole" to "reduce its reliance on the Delta" goes to the core of the existing problem. As previously noted, the current decline of the ecosystem relates directly to the record levels of export pumping in the last few years.

In addition, the draft recognizes that the state needs to better provide for years of shortage by maximizing exports when excess flow is plentiful (and other needs are being met) and by building greater self sufficiency in areas which now rely on the importation of water.

However, the draft comes up short by proposing a fundamental change in existing law. Though this change was at the direction of the Task Force, it creates a new obstacle to solving the Delta's needs. By making a policy choice that the ecosystem and the water conveyance needs will be co-equal, the Task Force opens up what can only be a long and bitter fight over how and to what extent the law must change.

The Task Force's decision is presumedly based a misunderstanding of what caused the current problems in the Delta. As previously stated, the Delta ecosystem has crashed because

the state and federal projects have maximized exports without legal authorization for the take of endangered (and threatened) species and have not operated under the existing limitations placed upon them by statutes and permits. The projects are only entitled to export water which is surplus to the needs of the areas of origin and the Delta, including the needs of the ecosystem in the Bay-Delta estuary. The Delta “crisis” has occurred because exports have been done without consideration for local and upstream needs, in contravention of water quality objectives (which are conditions to their permits) while killing untold endangered species without legal authorization. The only reasonable “vision” for the Delta’s future is to restore and enforce the proper limitations on exports so that both the ecosystem and the other users can be protected.

Making export needs “co-equal” with ecosystem needs is a mute point. First, CalFed tried that approach. Not only did it fail miserably, but litigation finally determined it was illegal. The requirements of the federal Endangered Species Act and the California Endangered Species Act are not subject to a balancing of needs. These statutes provide that certain mitigation and/or preservation *must* occur before exports are allowed. Although there is a certain amount of reasonableness in the application of the statutes’ requirements, there is simply no ability to balance the needs of exports (to provide a certain amount of water to one area of the state) against harm to endangered species.

Similarly, existing “public trust” requirements mandate that rivers have water, fish inhabit rivers, and the multiple beneficial users be able to enjoy both. There is no ability to impair those beneficial uses because one area of the state needs a certain amount of water.

Secondly and just as importantly, numerous existing statutes and case law authorizing exports set limitations on those exports, creating specified priorities. The Delta Protection Act requires that a “common pool” be maintained from which in-Delta and export needs are drawn (Water Code Section 12201); there be no exports of water to which in-Delta users are entitled (Section 12203); that exports be limited to that which is surplus to the uses protection by the Act (Section 12204); and that reservoir releases be coordinated to assist meeting the Act’s objectives (Section 12205).

Area of origin and watershed protection statutes (for example Section 11460 et. seq.) specify that all upstream (from exports) uses have a priority over exports. The area of origin statutes specifically anticipate that as time goes on, exports will decrease as more water is needed for the watersheds and Delta.

Case law and the current system of water rights require that the projects mitigate fully all their impacts to the system. This means that not only are they required to mitigate the harm constantly visited on third parties, but that they must identify and mitigate their impacts to the ecosystem.

None of these legal authorities provide for any sort of “balancing” of the needs of export areas against the other, specified priority needs. The draft Vision suggests some sort of committee or new governing body will make decisions that priority needs will get “so much” while export needs will get “some other amount.” On what would such a decision be made if not the current law? How would someone decide that exports get 7 million acre feet this year and the ecosystem gets one million? The problems created by such a system are too much to cover in one letter. Suffice to say that attempts to circumvent full protection of the environment, especially when some species are going extinct will end up like similar decisions made by CalFed; they will be quickly corrected by courts who will apply the laws of protection and priority.

This brings us to the next problem with the draft Vision. It concludes that in order to save the environment and provide (some unspecified level of) exports, “a greater physical or operational separation of (exports and the ecosystem) must be achieved.” As stated above, separating the two interests is directly contrary to the Delta Protection Act. This legislative mandate is to avoid the situation we now currently face. If all parties are dependent on the Delta for their water, then all interests will be focused on maintaining a good quality supply. As of now, the exports have ruined the water quality and now want to remove the remaining fresh water to protect themselves.

The Delta is not in trouble because the export system goes through the ecosystem; the Delta is in trouble because the exports took more than their share out of the ecosystem. Numerous authorizing statutes as well as permit conditions to the projects require that they maintain and protect the ecosystem. Removing them from the system merely gives them a priority to some amount of water at the expense of the other uses; a priority which does not exist.

Further, the conclusion about separating the two interests is wholly unsupported by the available information. Given the current set of legal limitations on export operations, the question is not how to protect a certain amount of export water, rather the question is how much water is available for export after providing for the specified priorities. Without determining how much is needed to preserve fisheries, how much is needed to mitigate project impacts to third parties, and how much is needed to protect all other uses, there can be no decision on how much can be exported. Hence the Vision should not try to protect existing or any level of exports. It should ask the relevant questions about what is to be protected and how that protection might work.

As referenced in SDWA’s previous submittals, the Task Force needs to ask how might the current system be operated to provide for all the priority needs in order to eventually model how and how much water might be available for exports. Once those questions are raised and answered, some process can then estimate the *reliable* source of water for those dependent on exports. One can never assume any amount is reliable before prior needs are met.

SDWA's previous comments included a comprehensive list of these questions. How are flood waters to be handled? How are net flows in channels to be maintained? How are existing water quality objectives to be met? What are the flow needs of the fisheries? How much of what new habitat is needed? These are the questions any Vision must include.

Unfortunately, the draft Vision does not ask them. In conjunction with Mr. Zuckerman's Plan, we have attempted to emphasize that the Delta's future is addressed by first starting upstream and making policy decisions about flood waters and the use thereof. The system must be designed and capable of carrying a certain flow. Some of that flow, as well as flows in excess of the system's capabilities must be routed as possible to maximize its use in later times. With that approach, one then can address how the Delta flows will be maintained, how much is needed for the various uses according to priority, and how the available flow will be used to meet the needs. We strongly urge the Task Force to adopt this approach. We hope to submit a follow-on proposal which fleshes out these concepts more fully.

There has been much said during this Vision process, all of which cannot be addressed in this letter. However, we need to respond to the anticipated reaction to our emphasis on priority. We do not view the current laws as impediments to California's future. Most of them were derived from long arguments in the conflicts during the time the massive export system was being conceived and authorized. As such, these laws are the agreed upon protections for approving the export system. Casting them aside because exporters want more water makes no sense. Enforcing them will allow the system to be restored and allow us to focus on the underlying issue of the state's water needs. Once we figure out how much is actually available for export, we can then know how much more water is needed by the state and work to develop it.

Changing laws such as ESA and CESA presents a monumental, if not insurmountable problem. Changing the laws of priority is not only similarly difficult, but is giving up. It would mean that the policy of the state is to protect innocent third parties unless and until they present an obstacle to some greater interest. Such cannot be the preference of the citizens of California.

We look forward to discussing these issues further. Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK

JH/dd